OFFICE / SALES / TECHNICAL / SUPERVISORY / EXECUTIVE

White Collar Management

A timely report on cases and decisions affecting management-employee policies and practices.

MAN & MANAGER, INC. · 799 BROADWAY · NEW YORK, N. Y. 10003

AGE DISCRIMINATION

Can You Refuse To Hire A Man Over 40 Because He Is Too Old For Your Retirement System?

The Problem: The uncertain impact of the ban against age discrimination now in the statute books in 26 states has personnel department heads concerned over the fate of company pension systems. The rub lies in statistics and life expectancy. The older the average age of employees, the costlier a plan is and the more unlikely that it can be maintained without major tinkering.

Confronted with this fact of life, management in one company laid down a rule — no applicant over the age of 40 could be hired. The company picked 40 as the dividing line because its longstanding retirement system provided a maximum entrance age of 40 and a compulsory retirement age of 65.

Apprised of the ruling, personnel required applicants to give the date of their birth and made no bones about the fact that anyone over 40 was ineligible. In fact, to save time, Bryan Fowler, an applicant, like others was told at the outset of his job interview that "if you are over 40, there is no use wasting yours or company time."

Fowler, an unemployed commercial artist, age 42, decided to challenge the company after his brother, an attorney, assured him that it was illegal in the state to refuse to hire someone because he was "over-age." Fowler wrote a letter to the State Commission for Human Rights charging violation of the law. The Commission got in touch with the company.

The company readily agreed to abide by a Commission ruling.

Said management in backing its policy:

1. We have had a bona fide retirement plan in effect for many years — long before the state passed its laws on age discrimination — which provides for a maximum entrance age of 40.
2. If we start hiring people over 40 and take them into the system, it will upset the cost factor on which the plan is based. After all, someone over 40 retires after shorter employment than a 25-year-old.
3. If we don't take them into the plan, we will have workers who by reason of their exclusion can very well become discontented.

The Answer: *The company's hiring practices are unlawful.* A retirement plan stating a maximum age for entrance which is bona fide and set up prior to the state laws on age discrimination may not be illegal, but to use it as an excuse to refuse applicants is another matter, the New York State Commission on Human Rights said.

On the other hand, the Commission added, we do not direct you to put the man into the retirement plan — that's your business. But hire him, you must.

HOW TO ACT LEGALLY → If a qualified applicant for employment is over the maximum age of your pension plan or any other fringe benefit, you should advise him of that fact during the job interview. You may tell him that he will be excluded from the plan if hired.

It is up to *him* to decide if he wants to take the job (assuming, of course, he has met all other requirements and is satisfactory to you) despite his exclusion from pensions or other benefits. This valid approach permits an employer to continue a plan without hazard or detriment and still stay within the law on age.

EMPLOYER REPUTATION

If You Promote An Image For 'Secure And Permanent Jobs,' Do You Weaken Your Right To Discharge Employees?

The Problem: A favorite gambit for companies scrambling to hire the best in a tight labor market is to picture themselves as a haven of promotions and security. Employers foster this impression by publicity, advertisements, brochures and pensions. The same result is obtained by the refrain to likely candidates: "Come with us — we promise good, permanent jobs. You won't regret it."

Among the giant companies that have an envied reputation is Du Pont. A leader in its treatment of white collar employees, executives and technicians, Du Pont is eagerly sought as an employer by those on the lookout to switch from other companies. Du Pont furthers its reputation by encouraging employees to think in terms of a permanent place.

Moreover, its printed forms explaining employee benefits to those hired limit the reasons for employment termination to discharge for cause and layoffs for economic reasons.

All this apparently was in the mind of Jim

Tomkins, a development engineer, when he gave up his job with a small Maryland firm and switched to Du Pont. In accord with the usual personnel treatment, Tomkins was asked to sign a form contract in which he assigned to the company all discoveries he might make and promised not to disclose any trade secrets should he leave.

The contract had only one other provision: that Tomkins would be employed "at a salary and for such lengths of time as shall be mutually agreeable."

Seventeen years after he took the job, Tomkins was dismissed. It took the form of a letter which said that Du Pont no longer had need for his services and that he would be given one month's pay in lieu of notice.

A rancorous Tomkins sped to his lawyer. When he told what happened, he alleged one other detail:

- ► Before I came to Du Pont, I was told by my interviewer and my future chief that so long as business warranted it, and I did my work, the job was permanent.
- ► Otherwise, why would I have given up a good spot with the old company and signed away rights on inventions?

A breach of employment contract suit was aimed at Du Pont. The company fought back:

1. Look at the wording of the written agreement. It gives us the right to fire Tomkins whenever we want.
2. Besides, this man never got the kind of assurances he claims. It's against company policy and unauthorized.

A Federal judge threw out the action. Tomkins appealed.

The Answer: *The employee wins his appeal.* The dismissal is reversed and a trial ordered by a U. S. Circuit Court to decide whether there was an oral agreement. The actions of Du Pont may have given its erstwhile employee "tenure on the job" where he did not have it originally.

Quite possibly, the Court said, the employee had an oral agreement, but that's up to judge and jury to decide.

"By various policies and acts, it appears that Du Pont encourages its employees to think in terms of a permanent place at Du Pont. Moreover, the contract contains no mention of a right of either party to terminate at will; nor does the contract provide for any notice of termination, separation pay, or other amenities which might be expected to follow employment subject to arbitrary termination." (352 F. 2d 936)

WHAT DO OTHER COMPANIES DO? The Court noted that other industry contracts imposing a duty of secrecy on an employee often specify periods of notice before ending a man's employment. It cited the standard pact used by the American Cyanamid Co.

This agreement permits termination on one day's notice for the first six months of employment. For any longer stretch, a blank space permits entry of a specific period.

AC's pact also adds: "Subject to the right of the company to terminate the employment at any time in the event of default or non-performance by the employee of any of the provisions of this agreement." One other proviso reserves the right of American Cyanamid to pay off the employee for the notice period while giving him immediate walking papers.

QUIZ CASE: HOW WOULD YOU DECIDE?

Can A Company Refuse To Take Back A Returning Veteran If His Job Has Been Changed?

The Problem: After four years of hiking in the infantry, Alan Baxter was in good condition to return to his old job as a field salesman.

"Welcome home," said Bill Butler, his former boss. "Nice of you to drop by for a visit." Then Alan told him why he was there — and Mr. Butler's mood changed. "We're not using outside salesmen any more," Butler told him. "I've got two new boys who handle everything by telephone."

"O.K., then," said Alan. "I'll take orders by phone. I've been doing too much walking lately, anyway."

When Butler explained that two men were enough and that he wasn't going to let either of them go, Alan remembered what he heard in the Army:

- ► You have to re-hire returning vets. The law's on my side.

Alan took his case to court. There, the company justified Butler's actions, claiming:

1. It is impossible to re-hire a man for a job that doesn't exist — outside salesmen are no longer used in the business.
2. It would be unreasonable to take the man on as a telephone salesman. The two we have are sufficient to handle the volume of business and cannot be replaced because they perform executive functions as well.

Was Baxter Rehired: YES ☐ NO ☐

(*See Decision — Page* 4)

HIRING PRACTICES

Are You Justified In Getting Rid Of An Employee Who Misrepresents His Education?

The Problem: While employers generally check a job applicant's employment references, they are often inclined to accept his educational data at face value. This creates a temptation for less scrupulous applicants to exaggerate or falsify their educational backgrounds.

What gave Edwin Pleever the edge over several candidates for the auditor's job at J. A. Harmore, Inc. was education. His application listed both a B. S. and M. S. in Accounting from Grisper University.

The truth came out more than a year after Pleever was hired. By chance, company president J. A. Harmore came across a "Register of Alumni" recently published by Grisper University. Nobody by the name of Edwin Pleever was listed.

When the auditor was asked about the omission, he readily admitted that he never attended any college. A furious Harmore summarily fired him.

Pleever applied for unemployment compensation. But when Harmore gave the board his reason for letting the auditor go, Pleever was denied compensation — because he was fired for misconduct. Pleever then appealed to the courts to overrule the unemployment compensation board, arguing:

1. Too much fuss is being made over what I said about my education.
2. My having held the job for over a year to Harmore's satisfaction shows how irrelevant it is whether or not I hold college degrees:

The board replied:

► An employer has the right to expect the truth on a job application.

► An employee who is untruthful is guilty of misconduct.

The Answer: *The employee's firing was justified and he is not entitled to unemployment compensation.* A Pennsylvania Superior Court noted that Pleever knew when he falsified his education that it was material to his employment. He could not but have known that discovery of the falsification would lead to his discharge.

"The employer had the right to expect that information material to the qualifications of the employee would be accurate and truthful. The deliberate falsification of such information is willful misconduct." (146 A. 2d 615)

WHAT TO DO→ Don't wait a year or rely on chance information to confirm what an employee said about his education. Many employers now ask a job applicant in whom they're interested to sign form letters, prepared by the company, which authorize any educational institution which the applicant claims to have attended to send a summary of his record there to the employer. You'll know the truth soon.

COMPANY RAIDING

Can You Put A Stop To Raids On Your Employees By Competitors?

The Problem: Today's longtime trusted employee can be tomorrow's abiding headache. So it turned out with Headstart Distributing Company, whose sales supervisor Jerry Pram walked out to take the job of sales manager with the company's arch rival, Melding Inc. With Pram went considerable knowledge of operations, routes and customers.

Both companies were in the rack jobber business — that is, they distributed non-food items (cosmetics, records, drugs, household utensils, etc.) through food retailers.

Pram planned his resignation carefully. First, he lined up his good friend, Lampson, another Headstart supervisor, to cooperate. Those talks continued secretly after Pram left. He also circulated among Headstart's salesmen to bring over some of the best men to his new employer.

The results of all these efforts were:

1. Three of supervisor Lampson's best salesmen switched over to Melding, after convincing a good number of customers to come along.
2. Lampson himself took a two-week vacation. During that time off, he visited one of Headstart's biggest customers for the purpose of switching the food chain over to Melding.
3. When the vacation ended, Lampson announced his new connection with Melding.

Understandably, Headstart was alarmed at the drain of personnel and customers. Gathering its evidence, the company went into Federal court and slammed its competitor with an antitrust suit for triple damages and an injunction:

► This raid on our employees is a violation of the monopoly laws. It is an attempt to eliminate Headstart from competition in Kansas and Colorado by stealing its key employees.

► Not only do we lose customers, but we are forced to shift and train new personnel.

Pram and Lampson's new employer pooh-poohed the charges and asked for a dismissal of the suit. Its defense went:

1. Hiring away employees from another company is part of the competitive game. Everyone faces that kind of "raiding." Pay your men better and they won't leave.
2. Suing under the antitrust laws is like hunting a flea with an elephant gun. Just because we take away a few men doesn't mean we are conspiring to put a company out of business. And even if that were so, eliminating a competitor doesn't make for a monopoly.

The Answer: *The raid is an illegal conspiracy to monopolize.* Defendant Melding is enjoined from further raiding. Besides, it must pay triple damages to the old employer of the departing salesmen and supervisors.

A U. S. Circuit Court said there was proof of an illegal restraint of commerce. "This occurs when a conspiracy exists to suppress competition in interstate trade through the elimination of a competitor by unfair means."

The disloyal ways used by employees Pram and Lampson to take away both customers and men exceeded the bounds of fair competition and such underhand methods are not to be approved. (353 F. 2d 618)

AN IMPORTANT RULING The subject of employee raiding has been before the courts many times. What makes this particular decision (handed down very recently) so striking is the antitrust angle. By suing in the Federal courts on a monopoly charge, the old company can collect triple damages. That is, if it shows it was hurt to the extent of $15,000, it gets an award of $45,000, and so forth.

EMPLOYER LIABILITIES

If Disaster Strikes, Do You Have To Fulfill Employment Contracts?

The Problem: The employer who is sensitive to morale and reputation considerations frequently will carry out a commitment to his employees even though an unexpected turn of events makes it unprofitable. On the other hand, there are times when disasters occur — fire, flood, drought, storms or unexpected death — "acts of God" that may, or may not, permit an employer to back out from his obligations to his help.

Such was the dilemma which faced the Jamison Credit Guide Co., a nationwide firm that publishes credit guides and affords it subscribers all kinds of financial data. One of the company's major assets was an index of over 3,000,000 cards containing financial information on persons and firms.

Because Denis Moore had demonstrated his prowess as a salesman in a rival company, Jamison was eager to lure him into its organization. Approaching Moore, the company said: "Work for us — we'll make you head of our Boston office. We'll give you a good salary plus an override commission on business that you and your men do in the New England territory."

"I'll take the job provided commissions are given on every new subscriber in the area," Moore answered. "Done," the company said and gave Moore a three-year pact.

Then disaster struck. A fire broke out in the Jamison home office and most of the company records were destroyed, including those 3,000,000 indispensable cards containing vital credit information. When the smoke had cleared and management had a chance to study its unenviable position, it decided that without the cards it could not maintain its credit information department. "We will confine our activities to publishing the Credit Guide only," the Board decided.

Regional sales chiefs were called in, including Moore. "We want you to continue as New England head," he was told. "You can't handle the sale of subscriptions for credit information because we're dropping that activity. What we do want is for you to direct sale of the Guide in your area."

Moore replied:

1. Nothing doing. That means a cut in commissions.
2. Pay me out on my contract — I'm quitting.

The company refused:

- As an "act of God" beyond our control, the fire has destroyed our ability to carry out the employment pact. So the contract is cancelled.

Moore thought otherwise and hit the company with a suit for damages.

The Answer: *The company loses* — it is still bound on the contract and must pay damages. The company has failed to demonstrate that it is impossible to carry out its deal with its employee, the Massachusetts Supreme Judicial Court said.

"The facts disclosed nothing more than a serious impairment temporarily of the profitable conduct of the business. The material destroyed had been accumulated, apparently, in the course of a few years and could be replaced by following the method in which it had been originally obtained." Since the cards were not the entire business of the company and their existence could be restored, management had failed to prove that the employment agreement was impossible to carry out. (152 N.E. 62)

IF DISASTER STRIKES: Make certain your employment contracts cover the company for major mishaps (this is one good reason for seeing to it that they are in writing). Standard "act of God" clauses are almost always included in business contracts between companies. There is no sound reason why similar provisions should not be incorporated in employment pacts with your sales people, executives and technicians.

REMEMBER It is a rare insurance policy, fire or otherwise, that covers the repercussions of disastrous events other than direct losses. Try to minimize subsidiary and collateral damages on which you have no insurance.

QUIZ CASE ANSWER

The Answer: *The company must re-hire the veteran.* The U.S. Court of Appeals, 3rd Circuit, did not regard the change of circumstances as significant. The company had employees who functioned as salesmen, even if the methods were different. There was nothing to indicate that the former outside salesman was less qualified to take orders by telephone.

The fact that the new employees had other duties, in addition to sales, had no effect on the veteran's rights, said the judges. (167 F. 2d 901)

BY WAY OF DISTINCTION The job in this case involved substantially the same skills as the old one. The only difference was that personal dealings were now carried on by telephone.

Had the company eliminated personal contact entirely, and changed over to a mail-order business, the Court might have decided otherwise. The position would have called for skills, such as writing or typing, which the old job did not require.